Neutral Citation Number: [2019] EWCA Civ 121

Case No: A3/2018/1479

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
PROPERTY, TRUSTS AND PROBATE LISTS
Mr Hollington QC, sitting as a Deputy Judge of the High Court
[2018] EWHC 1206 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/02/2019

Before:

LORD JUSTICE LEWISON
LADY JUSTICE KING
and
LORD JUSTICE COULSON

- -

Between:

(1) Andrew Mark Metson Parker **(2) Eve Mary Parker**	**Appellants**
- and –	
Jamie Trevor Roberts	**Respondent**

- -
- -

Adam Rosenthal (instructed by **Sydney Mitchell Llp**) for the **Appellants**
John Antell (instructed by **Direct Access**) for the **Respondent**

Hearing date: 18th December 2018

- -

Approved Judgment

Lady Justice King:

1. Mr Jamie Roberts (the Respondent) wishes to build a substantial property on land he owns to the rear of a house he owns in Surrey ("the yellow land"). The Respondent has planning permission to build the house, but the plan will have to be aborted unless he can establish: (i) that there is no effective restrictive covenant preventing him from building on the site notwithstanding that he has planning permission and (ii) that he can provide access to the plot by establishing that there is a right of way over a private road (the private road) owned by his neighbours, Mr and Mrs Parker (the Appellants) which road runs alongside part of the Respondent's garden, but does not connect with the yellow land, the proposed building site.

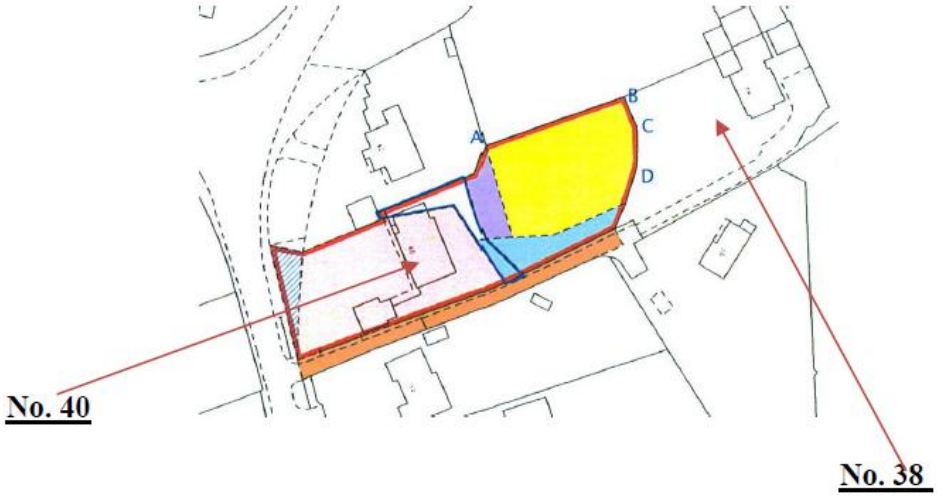
2. By a judgment dated 21 May 2018, the judge found in favour of the Respondent, holding (i) that a restrictive covenant prohibiting building on the land had not been properly entered on the register within the meaning of s32(1) of the Land Registration Act and is not therefore enforceable (Land Registration Act s.29(1)), and (ii) that the Respondent, as the owner, has a right of way across the private road allowing access to the yellow land. The judge's findings, if upheld, mean that there is nothing now standing in the way of the Respondent proceeding with his planned development of the yellow land.

3. The Appellants accept the finding of the judge that the restrictive covenant (which was undoubtedly intended to prevent the land from being built upon) is in the event, unenforceable. They maintain their appeal however against the decision of the judge that the owner of the yellow land has a right of way over the private road. Should the Appellants succeed in their appeal, the effect will be that the Respondent's plan to build on the land using the private road as access to it will be frustrated.

4. In order to decide if the judge was wrong in law in reaching the conclusion that he did, it is necessary to trace (and understand) the convoluted conveyancing history in relation to the land in question.

The Conveyancing History

5. The plan below shows the land as it is presently held and readily identifies the issue between the parties. It is best understood if seen in colour. The Respondent owns the land edged in red (No 40) and he wishes to build a house on the yellow land which, it can be seen, is within the curtilage of the land edged in red. The Appellants' land is No 38 and includes the private road, which is owned by them and coloured brown. The private road goes along the side of No 40 and continues beyond the Respondent's land, to a forecourt in front of the Appellants' house at No 38. There is insufficient space to create an entrance to the yellow land through the front part of the Respondent's land at No 40 and, it follows therefore that, unless there is a right of way along the private road, from which to gain access, the yellow land will become inaccessible if treated as an entity separate from the rest of No 40.



6. As of 17 February 1923, a Julius Fredrick Gems owned all the land in the vicinity, including the private road. In that year, Mr Gems conveyed the land now owned by the Appellants and the Respondent to a Gladys Muriel Hird. Mr Gemms retained ownership of the private road but granted a right of way over it to Mrs Hird.

7. There is then a gap in the conveyancing history, but by 1950 some, or all, of the land that had been conveyed to Mrs Hird (and which had the benefit of a right of way over the private road) was owned by a John Leslie Smith. Mr Smith in due course sold off the land piecemeal, although the private road itself continued to be owned by Mr Gemms and subsequently by his descendants. It is the subsequent transactions of Mr Smith that are the focus of the present dispute.

8. By a conveyance in 1950 ("the 1950 Conveyance") Mr Smith conveyed part of the land that he owned to a Caroline Mildred Anne Bruce ("Mrs Bruce"). That land ("the land sold") included what is now No 38 (the Appellants' land) and No 40 (the Respondent's land) but did not include the yellow land (called "the ponds" in the conveyance). The private road remained separate and stayed in the ownership of Mr Gemms, although the land sold by Mr Smith to Mrs Bruce was conveyed to her together, once again, with a right of way over the private road.

9. It can be seen by reference to the plan that, as a result of the 1950 conveyance, what is now the yellow land, became entirely separate from the land sold; it was not conveyed to Mrs Bruce by the conveyance, it remained in the ownership of Mr Smith and did not adjoin the private road. That separation was underlined by the fact that the conveyance specifically provided, at Clause 2, that it was "hereby agreed and declared":

> "(i) The Purchaser *(Mrs Bruce)* was not entitled to any right or access to or use of the ponds. (*the yellow land)* and"
>
> (iii) The Vendor *(Mr Smith)* or other owners from time to time of the adjoining land *(including the yellow land)* shall not be entitled to use the private road."

10. It was agreed at trial that Clause 2(iii) of the 1950 Conveyance could not operate as a release of the right of way over the private road, because the descendants of Mr Gemms still retained ownership of the private road and therefore, neither Mr Smith,

as vendor, nor Mrs Bruce, as purchaser, owned the road at the time of the 1950 conveyance.

11. In the following year, 1951, Mrs Bruce acquired the private road from a descendent of Mr Gemms. By a combination of the 1950 and 1951 Conveyances; (i) Mrs Bruce now owned No 38, the private road and No 40 which included the strip of land between the road and the yellow land (coloured in blue on the plan "the blue strip"); (ii) The right of way over the private road granted by the 1923 Conveyance was released.

12. On 31 October 1956, Mrs Bruce transferred all her land, including the private road, to a Mr Milne, who in turn sold it to Mr and Mrs O'Callaghan.

13. Twelve years later, on 6 May 1968, Mr Smith, who still owned land in the area including the yellow land, sold some of his remaining land bank to Enso Marketing. This land was on the north side of the yellow land, that is to say on the far side and furthest away from the private road. The yellow land was not at this time land-locked as it had the benefit of access through other land still retained by Mr Smith to the public highway at Fairmile Lane (which road can be seen on the plan running at right angles to the private road).

14. By the 6 May 1968 Conveyance, Mr Smith covenanted with Enso Marketing that he would not build on the yellow land. This covenant is of no direct relevance to the issues between these parties, as the benefit of the covenant was not annexed to land forming part of the land owned by the Appellants. Mr Rosenthal, counsel on behalf of the Appellants, submits that reference to the 6 May 1968 Conveyance and the restrictive covenant can however provide an aid to the construction of the crucial transfer with which this court is concerned, which transfer is dated nine days later on 15 May 1968 ("the 1968 Conveyance") and which contains a mirror covenant.

15. In 1968, therefore, Mr and Mrs O'Callaghan owned No 38 and No 40, including the blue strip. The yellow land, it will be recalled, was still owned by Mr Smith.

16. By the 1968 Conveyance, Mr and Mrs O'Callaghan sold back to Mr Smith the land that is now the front part of No 40, adjacent to the private road and facing onto Fairmile Lane ("the West No 40 land"). Mr Smith now, again, owned both this parcel of land and the yellow land; which together make up the land known as No 40, edged in red on the plan. The O'Callaghan's, however, retained ownership of the private road. As of the 1968 Conveyance, therefore, Mr Smith owned the whole of what is now No 40, albeit held under two separate conveyances; the yellow land since before 1950, and the balance of the land that now makes up No 40, ("the West No 40 land") by virtue of the 1968 Conveyance.

17. As a consequence of the 1968 Conveyance: (i) for conveyancing purposes, the yellow land and the blue strip which sits between the yellow land and the private road, were held under separate conveyances but owned by the same person and (ii) for the first time since 1951 (when Mrs Bruce had bought it) the private road was in separate ownership from the blue strip of land lying between the private road and the yellow land; and therein lies the difficulty with which the judge was faced.

The 1968 Conveyance:

18. The 1968 Conveyance (whose plan refers to the parcel of land that is called the "yellow land" in this judgment as "the green land") described rights of way and restrictive covenants as follows:

> "1….the vendor as beneficial owners hereby transfer to John Leslie Smith (purchaser) the land shown and edged with red on the plan bound up within and being all that piece or parcel of land forming a part of Eton Grange Cottage… Together with full and free right and liberty for the purchaser and his successors in title and all persons authorised by him or them (in common with all other persons who have or may hereafter have the like right) at all times hereafter and for all purposes connected with the present and every future use of the land hereby transferred with or without motor vehicles …the right to pass and repass along over and upon that part of the road which is tinted brown on the said plan which road leads from Fairmile Lane to the said Eaton Grange Cottage
>
> 2. The purchaser on behalf of himself and his successors in title owner or owners for the time being of the adjoining land which is shown and edged with green on the said plan (and hereinafter called "the green land") HEREBY COVENANTS with the vendors to the intent that the burden of this covenant may run with and bind the green land and every part thereof and to the intent that the benefit thereof maybe annexed to and run with the land retained by the vendors which is shown and edged with purple on the said plan and every part thereof (but not so that the purchaser or his successor in title shall be personally liable in respect of a breach after he or they should have parted with all or his or their interest in the green land)
>
> a) not to erect any dwelling house, garage or garden shed on the green land and
>
> b) to pay and contribute one half of the cost of repairing, maintaining and renewing the road coloured brown on the plan."

19. On the face of the conveyance, the effect is as follows:

i) The land transferred to Mr Smith (the West No 40 land) was transferred with a right of way over the private road "for all purposes connected with the present and every future use of the land hereby transferred".

ii) By Clause 2, the purchaser of the West No 40 land (Mr Smith) on behalf of himself and his successors in title as owner of the yellow land covenanted:

a) Not to build on the yellow land

b) To pay one half of the cost of maintaining "the road coloured brown".

20. Clause 2 of the 1968 Conveyance was drafted with a view to binding Mr Smith, as the owner of the yellow land, (and which did not form part of the 1968 Conveyance) in exactly the same way as he had accepted the burden of such a restrictive covenant in relation to the sale of the land to the north of the yellow land to Enso Marketing by the conveyance of 6 May 1968.

21. On the face of the conveyance, the effect of Clause 2 was to prevent Mr Smith from building on the yellow land, but also to tie him into paying half the cost of maintaining the private road, even though access to it could only be obtained by crossing the blue strip which was part of the "West No 40" land, the subject of the 1968 Conveyance.

22. Time has moved on since the 1968 Conveyance and now No 38 is owned, together with the private road, by the Appellants, and the land at No 40 including the yellow land, is owned by the Respondent, but, significantly, there is no longer access to the yellow land from Fairmile Lane itself.

The Parties' Positions

23. It having been held that the restrictive covenant in the 1968 Conveyance is unenforceable, the case now turns on whether there is a right of way over the private road to the yellow land.

24. In broad terms Mr Antell, on behalf of the Respondent, argues that it is clear from the 1968 Conveyance that the yellow land was entitled, together with the "land hereby transferred", referred to in Clause 1, to the benefit of the right of way over the private road because, he submits, the burden of the obligation to contribute to maintenance of the private road was imposed on the yellow land by Clause 2(b). Mr Rosenthal on behalf of the Appellants argues that the right of way over the private road cannot be used for the benefit of the yellow land independently of the "land hereby transferred" referred to in Clause 1 of the 1968 Conveyance.

Legal Argument

25. The judge was faced with interpreting the 1968 Conveyance. The critical part of the transfer is set out in full at paragraph 18 (above).

26. Mr Antell submits that the matter can, and should be resolved by a 'pure' construction approach. Although, he told the court, the skeleton arguments at first instance analysed the law on implied easements, the judge did not do so in his judgment but instead, Mr Antell submits, rightly came to his conclusions on a 'common sense' interpretation approach. Mr Antell put his case before this court as he did below:

> "Clause 2b is a positive covenant binding on the purchaser and on successors in title of, in terms, the "green land" (yellow land) to pay and contribute one half of the repairing, maintaining and renewing the road coloured brown on the said plan. It would make absolutely no sense for such a covenant to be imposed on the yellow land if the yellow land was not being

> granted (or did not already have) a right to use the road coloured brown, and the transfer, properly interpreted, grants a right of way for the benefit of a whole of the land which, following the transfer, is in the ownership of the purchaser including the yellow land which the purchaser already owned."

27. For his part, Mr Rosenthal argued that as a matter of construction, the grant in the 1968 Conveyance was clear stating that the right was granted "for all purposes connected with the present and every future use of the land hereby transferred". *(my emphasis).* The "land hereby transferred" did not include what is now the rear part of the garden of number 40 (the yellow land) and the Respondent, Mr Rosenthal says, seeks to imply a term that contradicts this express statement of the purpose of the grant. Further, Mr Rosenthal submits that, even setting aside the fact the grant makes clear the extent of the dominant land, an easement will only be implied where the easement is necessary for the enjoyment of an expressly granted right or where it is necessary to give effect to the common intention of the parties with regard to the purpose for which the dominant land is to be used. On neither basis, submitted Mr Rosenthal, can an easement be implied from the 1968 Conveyance so as to extend the dominant tenement of the expressly granted easement to the yellow land, which now forms part the rear part of the garden of number 40.

28. The judge set out Counsel's submissions in some detail and reached his conclusion in relation to the right as follows:

> "(16) I agree with Mr. Antell that, in order to make sense of clause 2(b), it is necessary to construe the 1968 Transfer so that the "Yellow Land" enjoyed a full right of way to the private road. In my judgment, this result is achieved, applying the usual principles of construction of contracts and deeds, by implying an easement to that effect. As the Defendants effectively accept, it cannot have been in the contemplation of the parties to the 1968 Transfer that the right of way was limited to the "transferred land". Mr. Rosenthal's submission, that sense can be made of it by allowing access to the "Yellow Land" as ancillary to access as part of No 40's garden including the "transferred land" (as per the Gore case), is attractive but it does not in my judgment acknowledge sufficiently the very specific annexation of the burden of the obligation to pay for repair to the "Yellow Land". It would be possible to regard that annexation as merely sloppy draftsmanship, but that would be too radical an interpretation in my view. And I note that the positive covenant to pay for the repair of the private road would not have been enforceable against successors in title to the burdened "Yellow Land" unless it was an adjunct to the enjoyment of a right of way: it would do violence to the language of the Transfer if the right of way to the "land transferred" were conditional upon compliance with the obligation to pay for the repair. A further reason why I do not consider it legitimate to read into any right of way to the "Yellow Land" the qualification suggested by Mr. Rosenthal,

> namely that the right of way could only be used so long as the "Yellow Land" was used as part of the garden, is that there is no covenant against the future sub-division of the plot. Instead, the covenant in clause 2(a) was inserted."

29. The judge, having had no difficulty in concluding that the yellow land had the benefit of a right of way across the private road, took the view that:

> "17……the real question in my judgment is: has that covenant ceased to be enforceable for non-registration?"

The judge, thereafter, rightly in this regard, concluded that the restrictive covenant preventing building on the yellow land was not enforceable. As a consequence of the error made by the Land Registry, the issue of whether there was, or was not, a right of way over the private road, whilst simply disposed of by the judge, has become the critical issue which will determine whether, notwithstanding the original intention to the contrary, the yellow land has the right of way over the private road which is essential if it is to be built upon.

Construction of the 1968 Conveyance

30. It would seem to me that in his paragraph 16 (as set out above) the Judge was dealing, in short form, with two possible routes, either of which if established by Mr Antell, could lead to the conclusion that there is a right of way over the private road to the yellow land.

31. The two routes are:

i) Construction of the transfer

ii) Implied easement

32. The Judge held that a proper construction of the transfer so that the yellow land has a "full right of way" was achieved by "applying the usual principles of constructions of contracts and deed, by implying an easement to that effect".

33. The judge referred to the "usual principles of construction" without any further particularisation. It is however well established that the terms of an express grant of right of way must be construed in accordance with the general rules as to the interpretation of legal documents.

34. Three construction possibilities have been considered to a greater or lesser extent:

i) On a "common sense" reading does a proper construction of the 1968 Conveyance lead to the conclusion that the "yellow land" as well as the "land hereby transferred" has a right of way over the private road?

ii) Whether the obligation to repair found at Clause 2(b) is a condition to which a right of way must be attached? and/or

iii) Can it be said that a right of way to the yellow land is necessarily ancillary to the right of way granted to the "land hereby transferred"?

35. Dealing with matters out of order, the questions at (ii) "condition" and (iii) "ancillary use" can be disposed of briefly.

36. Mr Antell's key submission remains that the mismatch whereby the land transferred had the right of way, but the yellow land had to pay for part of the maintenance is "absurd" and that the transfer should be read as saying at Clause 1 "the land hereby transferred *together with the green (yellow) land".* That, he submits is the only "sensible interpretation" and the judge was correct in so concluding.

37. In support of this submission, Mr Antell relied upon the general principle of benefit and burden saying that that the principle can be satisfied by saying that the obligation to repair the private road was a condition attached to the right of way.

38. In support of this argument Mr Antell took the court to *Wilkinson v Keredene Ltd* [2013] EWCA Civ 44. His difficulty in relying upon this case is that on the facts of that case, there was, on the face of the document, a right of way granted along the roads, car parks etc. in question. The issue was whether there was a sufficient degree of correlation between the covenant to pay towards their maintenance and the grant of the relevant property rights granted under the original conveyance such as to make the covenant bind a successor in title.

39. Mr Antell was unable to take the court to any authority where the fact of a contribution has resulted in a court implying a right of way otherwise not granted in the conveyance, rather than (as in *Wilkinson v Keredene Ltd*) where there is an express right coupled with a condition.

40. In my judgment a submission that the repairing covenant is conditional upon there being a right of way not otherwise granted on the face of the conveyance, cannot succeed.

41. The judge rejected Mr Rosenthal's submission that, from a pure construction perspective, sense could be made of the 1968 Conveyance by taking into account that access to the yellow land was ancillary to access to No 40's garden. There was nothing, he submitted, strange about restricting the right of way to the land transferred given that if (as indeed happened) the yellow land should subsequently be used as ancillary to the land transferred, the right of way could nevertheless be exercised to access the single plot. The judge took the view that such a construction did not sufficiently take into account "the very specific annexation of the burden of the obligation to pay for the repair to the yellow land".

42. In making his submission at first instance, Mr Rosenthal had relied upon the well-established rule in *Harris v Flower* [1905] 74 L.J. (Ch) 127 which was recently explained by the Court of Appeal in *Gore v Naheed* [2018] 1 P & CR 1 at [14] as follows: the "rule is that a right of way granted over Plot A to Plot B cannot, without more, be used by the owner of Plot B to access other land in his or another's ownership". However, if the "other land" is used for purposes which are ancillary to the use of Plot B (here as a garden), the right of way can be used to gain access to it. Importantly this ancillary use of the right of way does not extend the dominant tenement, which remains Plot B.

43. Mr Rosenthal accepts on appeal that the rule in *Harris v Flower* does not provide a complete answer to the construction point. He submits, however, that as the doctrine in *Harris v Flower* was well established at the time of the "1968 Conveyance", it provides important context for the parties' agreement to limit the grant of a right of way as per Clause 1, that is to say to the "land hereby transferred".

44. It is right, Mr Rosenthal says, that for so long as the yellow land forms a part of the garden of No 40, there is a right of way to it across the private road, ancillary to the right of way from which the West no 40 land benefits as a consequence of the 1968 Conveyance. That, Mr Rosenthal submits, is the limit of the right, as the yellow land does not become part of the dominant tenement for which the easement was granted by the 1968 Conveyance. It follows, that if the yellow land ceases to be used for an ancillary purpose (here by being carved off to become a building plot), it can no longer be accessed by exercising a right of way across the dominant land.

45. In my judgment, Mr Rosenthal is right in his analysis. The line of authorities culminating in *Gore v Naheed* support his proposition that the yellow land, as part of the garden of No 40, has an ancillary right of way over the private road, but no more.

46. I turn, therefore, to Mr Antell's key submission that the judge was correct in his "common sense" interpretation of the relevant clause.

47. Mr Rosenthal submits that the phrase "the land hereby transferred" unequivocally and absent any ambiguity, relates only to the "land hereby transferred" namely "the west No 40 land" and therefore not to the yellow land. Such a construction, Mr Rosenthal submits, is consistent with the covenant given by Mr Smith not to build on the yellow land already owned by him, and mirrors the covenant given a few days earlier to Enso Marketing in respect of the same yellow land. That this is the case, Mr Rosenthal submits, is relevant to a proper construction of the right of way, confirming as it does that it was only intended to be for the benefit of the land being transferred.

48. That this is the proper approach is reinforced, he says, by virtue of the fact that at that time of the 1968 Conveyance there was alternative access from Fairmile Road to the yellow land across other land retained by Mr Smith.

49. As the backdrop to his submissions and in response to what Mr Antell called the "common sense construction" of the 1968 Conveyance, Mr Rosenthal relies upon the Supreme Court judgments in *Arnold v Britton* [2015] AC 1619, a case neither referred to, nor analysed by, the judge.

50. Several passages are of particular assistance to the court in anchoring its approach to the construction of this transfer. Lord Neuberger said:

> "15. When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean", to quote Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 AC 1101, para 14. And it does so by focussing on the meaning of the

> relevant words…in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions."

51. And at [18]:

> "Secondly, when it comes to considering the centrally relevant words to be interpreted, I accept that the less clear they are, or, to put it another way, the worse their drafting, the more ready the court can properly be to depart from their natural meaning. That is simply the obverse of the sensible proposition that the clearer the natural meaning the more difficult it is to justify departing from it. However, that does not justify the court embarking on an exercise of searching for, let alone constructing, drafting infelicities in order to facilitate a departure from the natural meaning. If there is a specific error in the drafting, it may often have no relevance to the issue of interpretation which the court has to resolve."

52. Lord Hodge in his judgment said:

> "78. Nor is this a case in which the courts can identify and remedy a mistake by construction. Even if, contrary to my view, one concluded that there was a clear mistake in the parties' use of language, it is not clear what correction ought to be made. The court must be satisfied as to both the mistake and the nature of the correction…"

53. It is common ground that something has "gone awry" with the drafting of the transfer. Looking at the drafting, it is clear from Clause 1 that it was the intention of the parties to the conveyance that the contribution to the maintenance of the road was to bind successors in title.

54. As the judge observed, the positive covenant as found in Clause 2(b) would not have been enforceable against successors in title to the burdened yellow land unless it was an adjunct to the benefit of a right of way allowing a dominant party to give up the right and by doing so to escape the obligation. (See *Rhone v Stephens* [1994] 2 AC 310). Without the benefit of a right of way, any successors in title to the yellow land, take without the burden of the contribution to repair, contrary to the wording of the 1968 Conveyance by which it was clearly intended that successors in title would be bound by the obligation to repair.

55. Mr Rosenthal submits that the nature of the drafting error is obvious; the draftsman made a mistake by inserting the repairing covenant into Clause 2. Had Clause 2(a)

been included in the conveyance, but numbered as "Clause 3", the repairing clause, he submits, would then have made perfect sense as then the "land hereby transferred" would have been granted a right of way, subject to a contribution of maintenance, and there would therefore be, in relation to the "land hereby transferred", both a benefit and a burden in the time honoured way.

56. Mr Rosenthal says that this must be the case because it is well established that the burden of a positive covenant cannot be annexed to, and run with, land and the requirement to contribute under Clause 2(b) is a positive covenant (*Rhone v Stephens* [1994]).

57. It can be seen from the judge's para 16 (above) that, for him, the driving force for construction of the 1968 Conveyance was Clause 2(b), the positive repairing covenant imposed on the yellow land, which required the benefit of the right of way. In my judgment, the more appropriate driver is Clause 1; this is the clause that creates a right of way in respect of "the land hereby transferred". By Clause 1, which is itself unequivocal in its terms, the right of way is limited to the "land hereby transferred" by the 1968 Conveyance.

58. Mr Antell is therefore thrown back onto the principles in *Arnold v Britton* if he is to succeed in his core submission that the apparent 'mismatch' between Clause 1 and Clause 2(b) is "absurd" and that the only sensible construction is for the 1968 Conveyance to be read as there being a grant of a right of way to the yellow land in addition to "the land hereby transferred".

59. Mr Rosenthal submits that applying the principles in *Arnold v Britton,* the bargain struck by the purchaser with Mr Smith was for a limited grant of a right of way over Mr Smith's private road. This he submits is supported by:

    i) the restrictive covenant at Clause 2(a) not to erect a house on the yellow land which indicates that it was not intended that the yellow land should benefit from the right of way other than being accessible as garden ancillary to the dominant tenement

    ii) the yellow land (green land in the transfer) was specifically demarcated and labelled for the purposes of the restrictive covenant at clause 2 so that the parties could easily have extended the benefit of the easement to that land had that been the intention.

60. Whilst it is not necessary for a judge at first instance slavishly to refer to each of the six factors identified in *Arnold v Britton*, in the present case where the judge (focused primarily as he was on the restrictive covenant issue) gave no specific consideration to any of the features highlighted by Lord Neuberger, it is helpful to consider them, albeit briefly

61. In my judgment the principles in *Arnold v Britton* can be applied as follows:

    i) *The natural and ordinary meaning of the clause*: the first clause to be considered must be Clause 1 which unequivocally gave a right of way "for all purposes connected with the present and future use of the land transferred".

ii) *Any other provisions of the lease*: the oddity of Clause 2(b) in imposing a repairing obligation upon the yellow land must clearly be taken into account, but so too must the restrictive covenant preventing building on the same land. In my judgment the "centrally relevant words to be interpreted" are those found in Clause 1.

iii) *The overall purpose of the clause and the lease*: the overall purpose of the clause and the transfer was for Mr Smith to transfer the West No 40 Land to the purchasers with the benefit of a right of way over the private road, but with the benefit of a restrictive covenant ensuring that no one would build on the land immediately behind and adjacent to them, namely the yellow land.

iv) *The facts and circumstances known or assumed by the parties at the time the document was executed*. At the time of the transfer it was known that it was intended that the yellow land should not be built on, that there was a strip of land (the blue strip) belonging to No 40 between the yellow land and the private road, and it was known that Mr Smith owned additional land which allowed access from Fairmile Road to the yellow land.

v) *Commercial common sense*: Lord Neuberger in this respect said:

> "19. … The mere fact that a contractual arrangement if interpreted according to its natural language has worked out badly or even disastrously, for one of the parties is not a reason for departing from the natural language. Commercial common sense is only relevant to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties, as of the date that the contract was made.
>
> 20…. While commercial common sense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject a provision of a contract simply because it appears to be a very imprudent term for one of the parties to have agreed even ignoring the benefit of hindsight."

Such an approach would favour Mr Rosenthal's interpretation of the 1968 Conveyance.

vi) *Disregarding subjective evidence of any parties' intentions:* there is no evidence of the parties' intentions at the date of the 1968 Conveyance. They would be irrelevant in any event.

62. Mr Antell submits that the court should add in the words *"including the area marked in green (yellow)"* following the phrase "the land hereby transferred". As Lord Hodge pointed out at para 78 of *Arnold v Britton* where a court is satisfied that there has been a clear mistake in the parties' use of language then before identifying and remedying such a mistake by construction, the court must be "satisfied as to both the mistake and the nature of the correction".

63. In my judgment the court cannot be satisfied that the mistake is that advanced by Mr Antell, namely that the drafter failed, at Clause 1, to grant a right of way over the yellow land. On a proper analysis, and taking into account the principles rehearsed in the judgment of Lord Neuberger, it seems to me more likely that the 'mistake' was in rolling up the purchaser's covenants in one clause and thereby eliding the covenants in relation to the property Mr Smith already owned (the yellow land – the prohibition on building a house) with that in respect of the newly purchased land (the contribution binding his successors in title to contribute to the upkeep of the road over which by Clause 1 he had been granted a right of way).

Conclusion as to construction

64. In my judgment, the judge fell into error in his approach in para.16 of his judgement. Had he taken as his starting point Clause 1 and focussed on the granting of a right of way to "the land hereby transferred," I suspect he would not have so readily concluded that the "only sensible outcome" was to decide that the mismatch between Clause 1 and Clause 2(b) could only be resolved by a declaration that the yellow land also had a right of way over the private road.

65. The 1968 Conveyance as drafted may well not wholly achieve what was originally intended, namely that the owners of the West No 40 land, the "land hereby transferred", should contribute to the maintenance of the private road. Nevertheless, the conveyance grants the right of way as intended, to the West No 40 land only. Although the 1968 Conveyance, as drafted, requires the maintenance contribution from the yellow land and not the West No 40 land, that state of affairs lasts only so long as the yellow land is in its present ownership and has the use of the right of way ancillary to that of the West No 40 land as part of the garden. Upon sale, when that ancillary use evaporates, so too will the obligation to maintain.

Implied Easement

66. The judge referred to "applying the usual principles of construction of contracts and deeds, by implying an easement to that effect". The judge did not go on to consider the law in relation to implied easements. Mr Antell submits that the judge did not need to do so having found unequivocally that on a straightforward construction of the 1968 Conveyance the yellow land had the benefit of a right of way, as well as the burden of maintaining the private road. The use by the judge of the word 'implying' was not, he submits, used in any technical way.

67. As a consequence of his overall approach to construction, the judge did not consider whether a right of way over the private road in order to gain access to the yellow land was an implied easement; this was an issue which would have been approached by reference to the principles set out by the House of Lords in *Moncrieff v Jamieson* [2007] UKHL 42; [2007] 1 WLR 2620. *("Moncrieff")*

68. Mr Antell submits that in the event that this court allows the appeal on the "pure" construction point, the proper course would be to remit the matter to the trial judge for a trial of the issue as to whether there is nevertheless a *Moncrieff* implied easement. Such a course would be appropriate, he says, as the making of findings of fact would be necessary, a task to which the Court of Appeal is ill-suited. I wholly endorse the submission that this court is not in a position to make findings of fact, but in my

judgment before remitting the matter and embarking on that inevitably expensive and time-consuming exercise, it is necessary to consider whether, on the established facts, the case is capable of falling within the *Moncrieff* principles.

69. In support of this submission, Mr Antell relies upon the following passage in the judgment of Lord Hope in *Moncrieff:*

> "[30] The third point is that while the express grant must be construed in the light of the circumstances that existed in 1973, it is not necessary for it to be shown that all the rights that are later claimed as necessary for the comfortable use and enjoyment of the servitude were actually in use at that date. It is sufficient that they may be considered to have been in contemplation at the time of the grant, having regard to what the dominant proprietor might reasonably be expected to do in the exercise of his right to convenient and comfortable use of the property. In *Pwllbach Colliery Company Ltd v Woodman* [1915] AC 634, 643 Lord Atkinson said that what must be implied is what is necessary for the use or enjoyment, in the way contemplated by the parties, of the thing or right granted. Activities that may reasonably be expected to take place in the future may be taken into account as well as those that were taking place at the time of the grant."

70. In my judgment any consideration of *Moncrieff* also requires attention to be taken of the judgment of Lord Mance:

> "112. Thus, there are cases where a right is implied where it is necessary for 'the comfortable enjoyment' or "the convenient and comfortable enjoyment" of the hereditament which is severed (as in *Ewart*), and there are cases where a right is implied because it is 'reasonably necessary' for the 'exercise or enjoyment' of an expressly granted right (as in *Jones v Pritchard*). In the latter type of case, it seems to me important to focus on the dual nature of the requirement that the alleged implied right be 'reasonably necessary'. Without the necessity, there would be the danger of imposing an uncovenanted burden on the servient owner, based on little more than sympathy for the dominant owner; without the reasonableness, there would be a danger of imposing an unrealistically high hurdle for the dominant owner. In the former type of case, it seems to me that the test is effectively the same: the references to "*comfortable* enjoyment" and "*convenient and comfortable* enjoyment" being equivalent to the reasonableness in the latter type of case.
>
> 113. In fact, it appears to me that these two types of case are no more than examples of the application of a general and well established principle which applies to contracts, whether relating to grants of land or other arrangements. That principle is that the law will imply a term into a contract, where, in the

> light of the terms of the contract and the facts known to the parties at the time of the contract, such a term would have been regarded as reasonably necessary or obvious to the parties."

71. Mr Antell is asking for the case to be remitted to the judge in order for him to argue that the granting of a right of way over the private road to the yellow land would have been regarded as "reasonably necessary" or "obvious" to the contracting parties at the time of the 1968 Conveyance on the basis that it was necessary for the "comfortable use and enjoyment of the land".

72. With the greatest respect to the tenacity of Mr Antell on behalf of his clients, such a submission is, in my judgment, hopeless. Mr Antell realistically does not submit that such an easement would of itself have been "necessary", but rather he submits that the "present need" for a right of way in order for the building project to proceed, should be regarded as an "activit(y) that may be reasonably expected to take place in future" and which therefore "may be taken into account as well as those that were taking place at the time of the grant" per *Moncrieff.* By this route, he says, an easement can be implied.

73. In my judgment, such an argument has no more hope of succeeding than one based on necessity: first and foremost given the restrictive covenant at Clause 2(a) of the 1968 Conveyance of all the activities which might reasonably have been expected to take place in the future at the time of the 1968 Conveyance, the least likely, it might be thought, was the need for the yellow land to have a right of way over the private road in order to allow access to facilitate residential development.

74. Secondly, as submitted by Mr Rosenthal, by Clause 1 of the 1968 Conveyance, the express words of the grant were limited to the "land hereby transferred". Only in exceptional circumstances, he says, will the court imply an easement that would contradict such an express restriction which had been part of the original bargain.

75. In *Waterman and another v Boyle* [2009] 2 EGLR 163, Arden LJ (as she then was) said:

> "[31] In my judgment, if the parties had intended any further right of parking there would have been an indication to that effect in the transfer. Nothing in the surrounding circumstances at the time of the transfer supports the implication of any further right. I would indeed go further and hold that, where there is an express right attaching to the same property of a similar character to the right which is sought to be implied, it is most unlikely that the further right will arise by implication. The circumstances would have to be quite exceptional."

76. I agree and further, Arden LJ specifically considered *Moncrieff* (a case about parking spaces) in her judgment saying:

> "[34] *Moncrieff* provides no support for the judge's conclusion. That case established that for the purposes of Scots law (which for this purpose was held to be the same as English law: see [29], [45] and [111]) a right to park was capable of being

> implied into a right of vehicular access if the right to park was reasonably necessary for the exercise or enjoyment of that right. On the facts of that case, the test for the implication of the right to park was met. But the facts were quite exceptional. The right of access, to which the owners of the house were entitled, led to a gate. This was the only access to a house on the shore below, at the foot of a steep cliff. The nearest parking was some 150 yards away up a steep hill. It was in those circumstances held to be reasonably necessary to use the right of access for parking vehicles. The parking had to be for purposes reasonably incidental to the enjoyment of the house on the shore and was not to interfere with the servient owner's own enjoyment of the land. (The parties had in fact effectively agreed to limit the parking to two vehicles in designated spaces). The facts of *Moncrieff* are far removed from the present case, and the case turned on its special facts. The test applied in that case is that set out above but its application to the facts of this case leads to a very different result.

77. In my judgment the crucial words in this passage are that "The parking had to be for purposes reasonably incidental to the enjoyment of the house on the shore and was not to interfere with the servient owner's own enjoyment of the land". Not only cannot it not be reasonably suggested that the proposed right of way is incidental to the enjoyment by the Respondents of their property at No 40 (in which they no longer live, although it would no doubt be financially extremely advantageous to them) but this litigation is, in large measure, all about the servient owners' loss of enjoyment of their land.

78. The Appellants are, through no fault of their own, unable to rely on the restrictive covenant specifically granted in the 1968 Conveyance, a restriction which was designed to prevent precisely the situation in which they now find themselves. Should the easement sought be implied and a house of approaching 5,000 square feet be built on the rear garden of No 40, the effect on the enjoyment of their property, only metres away, is obvious.

79. In my judgment there is no basis upon which the judge could properly have concluded that an easement should be implied on the agreed facts of this case, either on the basis of 'reasonable necessity' or on the basis that the building of a property on the yellow land was an activity which at the time of the 1968 Conveyance was an activity which was "reasonably expected to take place in the future".

Rectification of the Register

80. Mr Antell submits that should the appeal succeed, the matter should be remitted on a further basis, namely to allow the lower court to adjudicate in relation to the rectification of the Land Register, Mr Antell contends that the Respondents are entitled to rely on statutory vesting under s.58(1) of the Land Registration Act 2002.

81. Mr Rosenthal, rightly, points out that this issue is outside the scope of this appeal. The judge did not deal with the matter, even briefly, and no Respondent's notice has been filed seeking to uphold the judgment on other grounds. We allowed brief

submissions on the point, Mr Rosenthal arguing that, on the facts of this case, one would be looking at an alteration to the register which does not amount to a rectification within para. 1 of sched. 4 to the Land Registration Act 2002. I, for my part, am entirely satisfied that this issue is outside the scope of the appeal and the absence of a Respondent's Notice on such a technical issue, where the judge made no reference to it at all in his judgment, is fatal to Mr Antell's argument that the court should either itself determine the matter or, alternatively remit it for hearing in front of the same judge.

Conclusion

82. It follows therefore that, if my Lords agree, the appeal will be allowed and the declaration made by the judge at para. 1 of his order of 21 May 2018 that:

> "the right of way granted by a transfer dated 15 May 1968 which is noted at entry number 3 of the Property Register of the title of 40 Fairmile Lane, Cobham (No 40)….is exercisable by the Claimant and his successors in title for the benefit of the whole of the land comprised in the said title at the date of the Order and every part thereof."

is set aside and the court declares, as counterclaimed by the Appellants, that the right of way does not benefit the yellow land.

Lord Justice Coulson:

83. I agree with both judgments.

Lord Justice Lewison:

84. I agree. The language of the transfer is clear. The right of way was granted for the benefit of the "land hereby transferred". The parties knew perfectly well that the "land hereby transferred" did not include the yellow land, because they described it separately and specifically in the Transfer. The judge did not attempt to interpret those words. Rather, he thought that something had gone wrong with the language of the transfer, and therefore added in words to the description of the dominant tenement.

85. In *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 AC 1101 at [22] Lord Hoffmann approved the following statement of principle from *East v Pantiles (Plant Hire Ltd)* [1982] 2 EGLR 111, subject to two qualifications which are immaterial for present purposes:

> "Two conditions must be satisfied: first, there must be a clear mistake on the face of the instrument; secondly, it must be clear what correction ought to be made in order to cure the mistake. If those conditions are satisfied, then the correction is made as a matter of construction."

86. In *Arnold v Britton* Lord Hodge made the same point at [78] in the passage that King LJ has quoted. I agree with her that (if we were to assume that there had been a drafting error) there at least two candidates for the necessary correction. One is to expand the scope of the right of way to encompass the yellow land. Another is to

move the covenant to contribute so as to place that burden on the dominant owner rather than the owner of the yellow land. Given that the existence of the covenant not to build on the yellow land was plainly intended to be enforceable (and would have been enforceable against the original purchaser), it is unlikely that the second alternative is correct. But even if that is wrong it cannot be said that the first alternative is "clear."

87. So far as the principle of benefit and burden is concerned, the principle is usually formulated as "he who takes the benefit must bear the burden". Mr Antell's argument turns that principle on its head. We were shown no authority to support the proposition that "he who bears the burden must be entitled to the benefit." I agree with King LJ that the fact that the covenant to contribute to the maintenance of the roadway was placed upon the owner of the yellow land does not lead to the conclusion that the yellow land formed part of the dominant tenement.

88. In paragraph [16] of his judgment the judge said that he was applying "the usual principles of construction … by implying an easement." As King LJ has pointed out the judge did not identify what principles he was applying. He also appeared to consider that construction and implication were the same thing. Although that once appeared to be the law (see *Attorney-General of Belize v Belize Telecom Ltd* [2009] UKPC 10, [2009] 1 WLR 1988) the law has moved on. We have been told in no uncertain terms by the Supreme Court that interpretation and implication are different; and that a term can only be implied if either:

    i) It is necessary for the business efficacy of the contract or

    ii) It is so obvious that it goes without saying.

    (*Marks & Spencer plc v BNP Paribas Securities Services Trust (Jersey) Ltd* [2015] UKSC 72, [2015] AC 742).

89. The judge did not explain which of these tests (if either) he was applying. I agree with King LJ that, looking at the transfer as a whole, one can confidently conclude that building on the yellow land was something that the parties intended to prohibit. That of itself means that it is impossible to imply an easement which would facilitate the very thing that the parties expressly prohibited. The fact that the covenant has subsequently turned out to be unenforceable against successors in title can have no bearing on either the correct interpretation of the transfer or on the question whether a term can be implied.

90. For these reasons, in addition to those given by King LJ, I agree that the appeal must be allowed.